Muralidharan Nair a/l Prabhakaran v Matrix Circle (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D1–28–392 OF 2005
VINCENT NG J
28 JANUARY 2008

Companies and Corporations — Shares — Trust — Money advanced by third party on formation and get up capital of respondent company — Whether petitioner held share in trust for third party — Whether presumption of resulting trust had arisen — Whether rebutted by petitioner

Companies and Corporations — Winding up — Locus standi — Money advanced by third party on formation and get up capital of respondent company — Whether petitioner had held share in trust for third party — Whether petitioner could file a petition to wind up respondent company pursuant to s 218(1)(i) of the Companies Act 1965 — Whether petitioner had locus standi to file petition — Whether equitable principles invoked — Companies Act 1965 s 218(1)(i)

The petitioner formerly worked in the same company with one R Charles Penafort ('Charles') and they became friends. In July 2003 when the company decided to cease its business operation in Malaysia, the petitioner and Charles incorporated the respondent company to run a similar business, in particular the business of producing wet cooling towers, as they had acquired sufficient experience and knowledge in that business. The registered shareholders of the respondent were the petitioner and Yap Chooi Lee, the wife of Charles. The petitioner contended that he was solely running the respondent's business affairs since August 2003 until January 2004 when Charles started coming into the respondent's office and introduced himself as the managing director of the respondent. Sometime in November 2004, after Charles started to assert his influence and control in the running of the respondent, the petitioner came to know that Charles and his wife had misused the respondent's funds. Since January 2005, the petitioner was left out from the management of the respondent's business affairs. Based on these facts, the petitioner instituted the present winding up proceedings pursuant to s 218(1)(i) of the Companies Act 1965 ('the Act'), and contended that since there was absolutely no mutual trust and confidence between the two shareholders of the respondent, it is just and equitable to wind up the

respondent. In opposing the winding up petition, the respondent averred that the petitioner was merely holding the shares on trust for Charles and that the petitioner was only employed to work for Charles in the respondent with a monthly income of RM3,000. According to the respondent, the petitioner did not at any time injected any capital or funds into the respondent and that both the petitioner and Yap Chooi Lee were mere trustees of Charles and nothing more.

Held, dismissing the petition with costs:

(1) Based on the undisputed documents exhibited in the respondent's affidavit, the respondent had adduced enough cogent evidence to show that the petitioner was holding and had at all material times held the share registered under his name in the respondent on trust in favour of Charles, and that the petitioner had failed to discharge the burden which had shifted to him to show otherwise (see para 9).

(2) Further, the petitioner until now had not been able to condescend upon any particulars or documents that would indicate the nature or extent of his monetary contribution to the capital or running expenses of the respondent. Thus, by applying normal evidential principles, the petitioner had indeed held, and is now holding his shares in the respondent in trust for Charles (para 13).

(3) When money was advanced for or property transferred to or purchased for a person, either of two situations may arose, the presumption of advancement or the presumption of resulting trust, both of which were rebuttable. Due to the absence of any equitable obligation on the part of the provider of funds in the instant case, the presumption of advancement did not arise. From the evidence adduced by the respondent, it had successfully raised the presumption of resulting trust which imposed an onus on the petitioner to rebut this presumption through his affidavit evidence (see paras 15–16 & 18).

(4) In the light of the facts disclosed in the respondent's undisputable affidavit, the court was unable to accept the petitioner's contention that he was the rightful owner of his share in the respondent. Surely, as he was in a prominent position despite not having to incur any expenses, the petitioner must had been a mere trustee of the said share on behalf of Charles. Clearly, the respondent had sufficiently shown that the petitioner had at all material times held the share in trust for Charles. The petitioner had also failed to discharge the burden which had shifted to him. As Charles was the rightful owner of the share, the petitioner

was not free to act as he wished. He was subjected to Charles's directions. Hence, the petitioner had no locus standi to commence this petition (see para 18).

(5) It is incumbent upon the courts, in its determination of any petition under s 218(1)(i) of the Act, to consider and be guided by the established principles of equity, whether or not any issue of shares being held in trust had been raised. Following the trite principles laid down by the authorities, in the light of the particular circumstances deposed to in the respondent's affidavits, it would be wholly inequitable, unjust and contrary to good faith to allow the petitioner to rely upon and exercise his strict legal powers to insist that this court made a drastic winding up order against the respondent (see para 27).

[Bahasa Malaysia summary

Pempetisyen sebelum ini bekerja di syarikat yang sama dengan seorang yang bernama R Charles Penafort ('Charles') dan mereka telah menjadi kawan. Pada Julai 2003 apabila syarikat tersebut membuat keputusan untuk menghentikan operasi perniagaannya di Malaysia, pempetisyen dan Charles menubuhkan syarikat responden untuk menjalankan perniagaan yang sama, khususnya perniagaan mengeluarkan menara penyejuk yang mereka telah memperoleh pengalaman dan pengetahuan yang mencukupi dalam perniagaan tersebut. Pemegang saham responden yang berdaftar adalah pempetisyen dan Yap Chooi Lee, isteri Charles. Pempetisyen menegaskan bahawa dia telah menjalankan urusan perniagaan responden berseorangan semenjak Ogos 2003 sehingga Januari 2004 apabila Charles mula menyertai responden dan telah memperkenalkan dirinya sebagai pengarah urusan responden. Sekitar November 2004, selepas Charles memulakan untuk memperlihatkan pengaruh dan penguasaannya dalam mengendalikan responden, pempetisyen telah mendapat tahu bahawa Charles dan isterinya telah menyalahgunakan dana responden. Sejak Januari 2005, pempetisyen telah keluar daripada pengurusan perniagaan responden. Berdasarkan fakta-fakta ini, pempetisyen memulakan prosiding penggulungan ini menurut s 218(1)(i) Akta Syarikat 1965 ('Akta tersebut') dan berhujah bahawa memandangkan tidak terdapat langsung kepercayaan dan keyakinan di antara kedua-dua pemegang saham responden, adalah adil dan saksama untuk menggulungkan responden. Dalam membantah petisyen penggulungan, responden menegaskan bahawa pempetisyen hanya memegang saham secara amanah bagi pihak Charles dan pempetisyen hanyalah diambil bekerja oleh Charles untuk responden, dengan pendapatan bulanan sebanyak RM3,000. Menurut responden, pempetisyen tidak pernah sama sekali menyuntik sebarang modal ke dalam responden dan kedua-dua

pempetisyen dan Yap Chooi Lee adalah hanya pemegang amanah kepada Charles dan tidak lebih dari itu.

Diputuskan, menolak petisyen dengan kos:

(1) Berdasarkan dokumen yang tidak dipertikaikan yang diekshibit di dalam afidavit responden, responden telah mengemukakan keterangan meyakinkan yang cukup untuk menunjukkan bahawa pempetisyen telah memegang dan telah pada sepanjang masa yang material memegang saham responden yang didaftarkan di bawah namanya secara amanah bagi pihak Charles, dan pempetisyen telah gagal untuk melepaskan beban yang telah beralih kepadanya untuk menunjukkan sebaliknya (lihat perenggan 9).

(2) Selanjutnya, pempetisyen sehingga kini tidak dapat mencapai persetujuan tentang apa-apa butir atau dokumen yang boleh menunjukkan sifat dan setakat mana sumbangan kewangannya kepada modal atau perbelanjaan pengurusan responden. Oleh itu, dengan mengaplikasikan prinsip-prinsip keterangan biasa, pempetisyen sememangnya memegang, dan sekarang masih memegang syernya di dalam responden dalam amanah untuk Charles (perenggan 13).

(3) Apabila wang telah didahulukan untuk perpindahan hartanah kepada atau pembelian untuk seseorang, sama ada salah satu daripada dua situasi ini timbul, anggapan pendahuluan atau anggapan amanah berbangkit, keduanya adalah boleh dipatahkan. Akibat ketiadaan apa-apa tanggungjawab ekuiti ke atas penyumbang wang di dalam kes ini, anggapan pendahuluan tidak berbangkit. Daripada keterangan yang dikemukakan oleh responden, ianya telah berjaya membangkitkan anggapan amanah berbangkit yang telah dikenakan tanggungjawab terhadap pempetisyen untuk mematahkan anggapan melalui keterangan afidavit (lihat perenggan 15–16 & 18).

(4) Berdasarkan fakta yang dikemukakan di dalam afidavit responden yang tidak dipertikaikan, mahkamah tidak dapat menerima hujahan pempetisyen bahawa dia adalah tuan punya sebenar saham di dalam responden. Pastinya, sebagai kedudukan yang menonjol sungguhpun tidak menanggung apa-apa perbelanjaan, pempetisyen mestilah seorang pemegang amanah saham tersebut bagi pihak Charles. Adalah jelas, responden telah menunjukkan dengan secukupnya bahawa pempetisyen telah pada setiap masa yang material memegang saham tersebut untuk Charles. Pempetisyen juga telah gagal untuk melepaskan beban yang telah beralih kepadanya. Oleh kerana Charles adalah pemilik sebenar saham tersebut, pempetisyen tidak bebas untuk bertindak sebagai mana yang diinginkannya. Beliau adalah tertakluk

kepada arahan Charles. Oleh yang demikian, pempetisyen tidak mempunyai locus standi untuk memulakan petisyen ini (lihat perenggan 19).

(5) Adalah kewajipan mahkamah, dalam penentuannya bagi mana-mana petisyen di bawah s 218(1)(i) Akta tersebut, untuk mempertimbangkan dan dibimbing oleh prinsip-prinsip equiti yang mantap, sama ada atau tidak mana-mana isu saham yang dipegang secara amanah telah dibangkitkan. Berikutan prinsip-prinsip nyata yang digariskan di dalam autoriti-autoriti, dan berdasarkan kepada keadaan-keadaan yang telah dideposkan di dalam afidavit responden, ia adalah secara keseluruhannya tidak saksama, tidak adil dan bertentangan dengan niat baik untuk membenarkan pempetisyen bergantung kepada dan melaksanakan kuasa perundangannya yang ketat untuk mendesak mahkamah ini membuat perintah penggulungan yang drastik terhadap responden (lihat perenggan 27).]

Notes

For a case on trust, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 934.
For cases on locus standi, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1244–1262.

Cases referred to

Chan Yoke Cher v Chan Teong Peng [2004] 4 CLJ 533 (refd)
Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 (folld)
Government of Malaysia v Datuk Chong Kok Lim [1973] 2 MLJ 74 (refd)
Indrani a/p C Rajaratnam & Ors v Fairview Schools Bhd [1997] 5 MLJ 267 (refd)
Miharja Development Sdn Bhd & Ors v Tan Sri Datuk Loy Hean Hong & Ors and another application [1995] 1 MLJ 101 (folld)
Neo Tai Kim v Foo Stie Wah [1985] 1 MLJ 397 (refd)
O'Neill & Anor v Phillips & Ors [1999] 1 WLR 1092 (folld)
Palaniappa Chettiar v Arunasalam Chettiar [1962] MLJ 143 (refd)
Ponniah v Sivalingam & Ors [1991] 3 MLJ 190 (refd)
Ram Kirpal Shukul v Mussumat Rup Kuari (1883) LR 11 Ind App 37; ILR 6 All 269 (refd)
Teh Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)
Vandevell's Trusts White & Ors v Vandervell Trustee Ltd, Re [1974] 1 All ER 47 (refd)

Legislation referred to

Civil Procedure Code [India] s 11
Companies Act 1948 [UK] s 222(f)
Companies Act 1965 ss 6A(6), 150, 181(1), 181(1)(a), 218(1)(i), 305, 355

A Companies Act 1989 [UK] s 459(1)
Evidence Act 1950 s 101

Jayanthi (Reventharen with her) (Reventharen & Associates) for the petitioner.
Muhammad Adam Abdullah (Adam Abdullah & Mani) for the respondent.

B **Vincent Ng J:**

INTRODUCTION

C **[1]** There were originally three enclosures before this court, namely:

(i) Enclosure 1 is the petitioner's petition for an order to wind up the respondent under s 218(1)(i) of the Companies Act 1965 ('the Act'), with certain consequential prayers also sought;

D (ii) Enclosure 16 is the petitioner's application by way of a summons in chambers, inter alia, for an order pursuant to s 305 of the Act to compel two individuals namely, Yap Chooi Lee, who is a director of the respondent, and R Charles Penafort to repay or restore, within three days from the order made hereof, the sum of RM580,000 taken from E the petitioner's account in two banks or any other sum disbursed from the petitioner's account after 15 June 2005; and

(iii) Enclosure 24 is the respondent's application via a notice of motion for, inter alia, an order that the Yap Chooi Lee as the sole director of the respondent be allowed to convene a meeting of the respondent in order F to carry out various acts specified in the motion under ss 150 and 355 of the Act. However, encl 24 has since been withdrawn and struck out.

RE ENCLOSURE 1

G *The petitioner's case*

[2] The petitioner formerly worked with a company known as Hamon (M) Sdn Bhd and befriended one R Charles Penafort ('Charles'), who at the material time was the Managing Director of Hamon (M) Sdn Bhd. In July H 2003, Hamon (M) Sdn Bhd decided to cease its business operation in Malaysia. Due to that fact, the petitioner and Charles toyed with the prospect of opening and continuing a similar business, in particular, the business of producing wet cooling towers, as they had acquired sufficient experience and knowledge in that business. After discussions between the petitioner and I Charles the respondent was incorporated on 1 April 2003 with an authorised paid-up capital of RM100,000 divided into 100,000 shares priced at RM1 per share. The paid up capital of the respondent was RM2 divided into two shares which were registered in the names of the petitioner and one Yap Chooi Lee, who is the wife of Charles. Both the petitioner and Yap Chooi Lee

also acted as the respondent's directors. It is the contention of the petitioner that the respondent is a quasi-partnership between him and Yap Chooi Lee because Charles did not wish to be involved in the newly incorporated company as he was, at the material time, also engaged in another company called Hassfort (M) Sdn Bhd. The petitioner contends that he was solely responsible in the running of the respondent from his residence between August 2003 and December 2003. In January 2004, Charles started coming into the respondent's office and introduced himself as the managing director of the respondent although there was never any resolution to this effect. Until now Charles was never a registered shareholder in the respondent. Sometime in November 2004, after Charles had started to assert his influence and control in the running of the respondent, the petitioner came to know that Charles and his wife had used some of the respondent's funds for their personal purposes such as for holiday expenses, payment for car installments, car insurance, and credit cards which were not related to the business of the respondent. Also some funds were transferred from the respondent's bank account to the personal account of Charles. Charles and his wife had refused to address the queries raised by the petitioner. Instead, Charles and his wife suggested that the petitioner receive a payment of RM50,000 as dividends and that an account be prepared by April 2005, to determine the dividends payable to the shareholders. Charles then suggested that one Yap Yen Cheng, who is the brother of Yap Chooi Lee, be appointed to prepare the accounts of the respondent. However, the petitioner rejected the suggestion because it could cause a conflict of interest. Since January 2005, the petitioner was left out from the management of the respondent's business affairs. After acquiring control of the respondent, Yap Chooi Lee and Charles treated the company as their own personal property and used the company's funds at their whim and fancy. They had also used the company funds to incorporate a company in Singapore called Matrix Cooling without the consent and knowledge of the petitioner. In order to gain control of the respondent, Charles directed the secretary of the respondent to increase the paid up capital of the respondent from RM2 to RM100,000 and to prepare the documentation to appoint him as director of the respondent. This was done with the purpose of altering the position of the petitioner's shareholding in the respondent without the consent or knowledge of the petitioner. Based on those facts the petitioner contended that there is absolutely no mutual trust and confidence between the two shareholders/directors of the respondent and hence, it is just and equitable that the respondent be wound up.

The respondent's case

[3] The respondent, through its affidavit in reply affirmed by Yap Chooi Lee, states that it was Charles who wanted to continue with the business then ran by Hamon (M) Sdn Bhd by entering into an agency agreement with

A Hamon (M) Sdn Bhd. The respondent came into existence when Charles bought a shell company for a sum of RM2,800 from Hero Ventures Sdn Bhd on 8 August 2003. To effect the respondent's business endeavor, the petitioner was employed to work for Charles in the respondent with a monthly income of RM3,000. Charles also appointed his wife, Yap Chooi
B Lee, and the petitioner as the only shareholders and directors of the respondent. However, both the petitioner and Yap Chooi Lee were mere trustees of Charles and nothing more. All initial capital to commence the respondent's business operation was contributed by Charles alone. The petitioner did not at any time inject any capital or funds into the
C respondent. The petitioner is a sports science graduate and had no knowledge or expertise pertaining to the business operation of wet cooling system which concerns mechanical engineering, whereas Charles, who is an engineer, has been involved in the same business for the past 23 years. After their relationship turned sour, Yap Chooi Lee lodged two police reports concerning
D the disappearance of the respondent's crucial documents, invoices and other materials which contained the respondent's secret information. The petitioner was called to the police station and returned some of the documents. It is the contention of the respondent that the petitioner had commenced this winding up petition in the teeth of strong objections from Charles and Yap
E Chooi Lee and with a mala fide intention to cause losses to the respondent. The respondent now enjoys substantial profits, with ongoing contracts amounting to RM6m to be completed. If the respondent is to be wound up, it would cause very adverse implications to the company and its employees as well as to its suppliers.

F

[4] It is the contention of the respondent that the petitioner here does not have locus standi to file this petition, the reasons being that he is a salaried worker and never contributed any funds in the formation or running operation of the respondent. The petitioner has not paid for even the single
G share registered in his name. It is common ground that the respondent originated from a shell company which was bought by Charles. And, it is also his firm assertion that he had injected funds into the respondent out his own pocket to enable the respondent to carry out its business enterprise. Both parties has conceded that it is trite company law that beneficial interests
H in the shares of a company are recognised. In *Miharja Development Sdn Bhd & Ors v Tan Sri Datuk Loy Hean Hong & Ors and another application* [1995] 1 MLJ 101 ('*Miharja Development*'), it was held by VC George J that the real shareholders of a company could exercise the rights of contributories and could petition to wind up the company and that: 'While a company need
I not, shall not, look behind the share certificate that is not to say that in fact shares cannot be held in trust by one person on behalf of a beneficiary'. I agree with and adopt the views of VC George J in *Miharja Development*. Indeed, s 6A(6) of our Companies Act 1965 does expressly accord statutory recognition to beneficial interest in shares for certain purposes set out therein,

as affirmed by the Federal Court in *Chan Yoke Cher v Chan Teong Peng* [2004] 4 CLJ 533, which stated in clear terms (at (h) p 545) as follows:

> From the reading of s 6A(6) it becomes obvious to us that it gives statutory recognition to beneficial interest in shares without the legal (or registrable) interest and the respondent's interest clearly falls under s 6A(6)(a), (b) and (c).

[5] On the issue of beneficial interest, in their opus, *Understanding Company Law* (7th Ed), P Lipton and A Herzberg have this to say, at p 266:

> A member of a company may hold shares in the capacity of trustee for a particular beneficiary. This is often done as part of a scheme to reduce taxation or to conceal the real identity of a shareholder.

[6] Given the peculiar facts of this case, a perceptive and analytical approach is called for. The real issue here is not whether, if there are two shareholders/directors of a limited company and they have reached a stalemate in their relationship, the courts would normally grant a winding up order similar to dissolving a two-members partnership. There is a welter of English case authorities which have advocated the making of winding up orders to resolve such disputes, and I myself have had occasion to deal with and to make winding up orders in such situations (which has been reported in the law journals). The fact matrix governing the instant case before me however presents a different problem, as the respondent has, at the outset through Yap Chooi Lee, moved this court to first determine the issue of the competency of the other shareholder/director to institute the petition itself, when Charles, the beneficiary had objected to the petition. The respondent contends that the petitioner is a mere trustee for Charles and now challenges the petitioner's locus standi to institute or maintain this petition.

[7] The first question (caption 'A' below), being a question of fact, is whether the petitioner had held his share in the respondent company in trust for Charles, and if the answer is in the affirmative, whether the petitioner could file a petition to wind up the respondent in the teeth of objections from the beneficiary, Charles. The second question (caption 'B' below) — which is a question of law, interconnected with the first question — is whether, if money had been advanced by Charles on the formation and get-up capital of the respondent, a rebuttable presumption of trust had arisen. And, the third question (caption 'C' below) which is also a question of law, is whether the law requires or enjoins this court to consider the principles of equity in a petition under s 218(1)(i) of the Act irrespective of whether or not the share is held in trust, considering the particular manner in which the wording of this provision has been couched.

Whether the petitioner had held his share in trust for Charles?

[8] This question of fact may be decided upon affidavit evidence for three reasons. Neither of the parties herein had, at any time, objected to this mode of determination nor had they applied to cross-examine their opponent on any of the affidavits, see *Teh Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 ('*Teh Bok Choon*'). Furthermore, there was no cogent dispute on the authenticity or on existence of any of the documents exhibited in the affidavits before me. In *Teh Bok Choon*, a Privy Council decision, the petitioner applied to have the respondent company wound up and the learned trial judge had made a winding up order on just and equitable grounds under s 218(1)(i) of the Companies Act 1965. He held that the petitioner had joined the company as a shareholder on the basis that he would be given a share in the management of the business and that he would remain a director so long as he held one quarter of the shares of the company and that the other shareholders would allow the petitioner to participate in the conduct of the affairs of the company. On appeal to the Federal Court it was argued that such underlying obligation had not been proved and was denied by the respondents. *The Federal Court took the view that although no litigant applied to call oral evidence and no litigant applied to cross-examine the deponents the court should have examined the deponents. In effect the Federal Court held in the face of the denial that the agreement was ever made, the trial judge should have heard oral evidence before deciding whether the alleged agreement was ever made.* They therefore allowed the appeal. The petitioner appealed to the Privy Council. It was held (at p 433):

(1) Viewing the facts as a whole Their Lordships are satisfied, as the trial judge was satisfied, that the petitioner was led to believe, even in the absence of any express assurance, that he would participate in the management of the company and that he would in any event be entitled to a seat on the board so long as he held one quarter of the issued share capital of the company;

(2) In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him, unless *some opposing party has applied for the attendance for cross-examination of the deponent* and that application has been granted and the deponent does not attend;

(3) If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts;

(4) In this case the board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company; and

(5) The appeal should be allowed and the order of the trial judge restored.

[9] Since it is the respondent who has alleged that the petitioner was, at all material times, only holding his share as trustee for Charles, I am mindful that the initial burden of proof, under s 101 of the Evidence Act 1950, lie with the respondent. Having perused the cause papers and affidavits filed by both sides, I am satisfied that the respondent has adduced enough cogent evidence to show that the petitioner is holding and has at all material times held the share registered under his name in the respondent on trust in favour of Charles, and that the petitioner has failed to discharge the burden which has shifted to him to show otherwise. My finding is based on the following facts elicited from undisputed documents exhibited in the respondent's affidavit in opposition as exhibit numbers 'YCL1 to 8' of encl 44:

(i) the respondent originated from an already existing shell company which was bought by Charles for a sum of RM2,800;

(ii) the petitioner did not contribute any funds to the purchase of the shell company;

(iii) upon careful study of the affidavit evidence tendered to this court, I could not find any evidence that the petitioner had injected any funds to enable the respondent to carry out its business operation, (see *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143, *Indrani a/p C Rajaratnam & Ors v Fairview Schools Bhd* [1997] 5 MLJ 267, *Re Vandevell's Trusts White & Ors v Vandervell Trustee Ltd* [1974] 1 All ER 47 and *Ponniah v Sivalingam & Ors* [1991] 3 MLJ 190);

(iv) there was no oral or written partnership agreement between the petitioner, Yap Chooi Lee and/or Charles;

(v) the petitioner had admitted that Charles could not get involved with the respondent's business due to his prior commitment with another company;

(vi) the petitioner and Yap Chooi Lee had no professional qualifications to handle the specialised engineering business;

(vii) in an e-mail message dated 17 July 2003 sent to Hamon Korea, Charles informed the company that he will hire the petitioner as a full-time employee for a minimum period of two years with a salary of RM2,500 per month; and

(viii) since the petitioner had admitted that Yap Chooi Lee is holding the other share on behalf of Charles, it strongly suggests that Charles had played an important and major role in the respondent.

[10] The undisputed fact that 'Matrix Circle' (respondent company) was indeed set up following a faxed proposal from Charles to one KH Chun on 10 July 2003, as set out in exh YCL–1, is consistent with the respondent's contention that the company was in fact set up by Charles. Exhibit YCL–1 reads as follows:

From: Charles [mailto: charlyp@pd.jaring.my]

Sent: Thursday, July 17, 2003 6:13AM

To: KH Chun

Subject: Fw: Malaysia-Confidential

----------Original Message----------

From: Charles

To: CHUN Kh

Sent: Wednesday, July 16, 2003 3:06PM

Subject: Malaysia – Confidential

I hope u can study my proposals below, and then we discuss by phone, if u are agreeable to proceed.

1. MHI Revamp Work

If still not too late, and HK can still discuss with MHI, then please be informed that HM has an agent in Malaysia. Set-up in 1999, for the purposes of securing PETRONAS projects for Air Coolers.

We have undertaken a couple of project, bid through FBM, and later executed by HDH.

If MHI wishes, then we can undertake the work through this company, and work executed through Hamon, Indo, and HK if necessary. Locally, the site supervision can be undertaken by ex-HM staff.

2. Proposal — Malaysia

As HM will now officially close 31 July 2003. I have decided to set-up a company. The name of the company is still being selected, and we may choose 'MATRIX CIRCLE'. These are from a list of readily available names. I initially thought of 'Hamon Services', but I don't know if Hamon will agree.

I will hire Murali full-time, for a minimum period of two years, at RM2,500 per month. We plan to lease an office next month at about RM1,000 per month. With other overheads (secretary, tel etc), the costs for two years will come to RM160,000 Murali may be given 5% to 10% share as incentive. I shall allocate between 15 to 30% share to HAMON KOREA.

The purpose of this company is to pick-up any local Customer Services work (spares.re-vamp.etc). We will provide local clients a service, if they need any help/maintenance, etc.

I think this may be a viable idea, and I would like to see if Hamon can issue me some sort of a support letter with the right to market, etc CS products, and if possible VAP and Industrial CT business for HK & Hindo.

We can perhaps help you with local erection, supervision services, out-sourcing with procurement, engineering, design, etc. Over the years we have built-up a good number of capable suppliers.

If you willing to consider, then we would like to immediately start with follow-up on existing project enquiries. Two clients here may be ready to award some CT's here, but we have to re-approach them under the new agency.

Please advise what u think of this idea, and also if we should proceed, or how u wish for us to format this as per Hamon guidelines.

Please let me know asap. Thanks,

CP (Charles Penafort).

[11] Most importantly, the 10 July 2003 proposal had also expressed the intention of Charles to hire the petitioner's services for RM2,500 per mensem with only 5% to 10% share incentive. Again, consistent with respondent's assertion that Matrix Circle was set up by Charles, the Maybank Deposite Slip dated 10 September 2003 (exh YCL–3) and the entry into the bank account of Matrix Circle (M) Sdn Bhd, as shown in its bank statement marked as exh YCL–4, clearly shows that a sum of RM100,000 had been credited into the account of Matrix Circle on 10 September 2003. It is also material to note that the bank slip (YCL–3) bears the handwritten words 'C Penafort's Personal Cheque'. Furthermore, it could not be a coincidence that a few days before the proposal contained in YCL–1, M/S Hamond Malaysia had offered the petitioner (who was then its employee) certain 'retrenchment benefits' — which was in fact endorsed by the petitioner on 4 July 2003 under caption 'Agreed and Accepted'. Exhibit YCL–8 bear the following contents:

HAMON MALAYSIA

1 July 2003

Mr. Muralidharan Nair

231 Jalan Maarof

59100, Bangsar

Kuala Lumpur

Re: Closure of Hamon Malaysia: Termination of Employment

As you are advised today, it is unfortunate that Hamon Malaysia office has to be closed. The reason was explained to you during our discussions.

The company is willing to hereby offer you the following as settlement for your re-trenchment benefit:

Notice Period: Two months salary;

Termination Allowance: Four months salary;

Unused Leave: 0.5 months salary;

Special Bonus: 0.5 months salary

Total: 7 months salary

Above will be applicable at RM3,500 per month = RM24,500.00.

You will continue to work for the Company from 1 August 2003 till 1 November 2003, in order to solve pending matters associated with contracts and collect receivables. You will then receive RM2,750 per month plus a special bonus of RM5,000 if all those matters have been performed successfully. You will work at home, with a fax machine and e-mail address and have a phone line which will be paid by the company.

We hope that this will be accepted and that both parties agree the above to be the full and final settlement, with no further recourse. The above will be effective 1 July 2003.

Yours faithfully,	Agreed & Accepted,
Sgd	Sgd
.....	.....
for P Hervier	Muralidharan Nair
Director, HTE Brussels	Date: 04/07/03

[12] It is of adverse implication to the petitioner that, to counter the respondent's clear and unchallenged evidence that Charles had invested RM100,000 into Matrix Circle's capital, the petitioner could only state — in para 25 of his affidavit in reply affirmed on 6 September 2005 (encl 45) — that Chooi Lee and Charles themselves must know his contribution and that the RM100,000 that Charles had claimed he had invested was for his own use, he said:

Ini adalah kerana Chooi Lee dan Charles sendiri tahu akan sumbangan saya dan wang sebanyak RM100,000 yang didakwa dilabur oleh Charles adalah untuk kegunaan peribadinya dan bukan semata-mata untuk kegunaan responden atau untuk menambahkan jumlah saham berbayar responden.

[13] When, on 28 January 2008, counsel for the petitioner was asked by this court, as a matter of clarification, whether the petitioner had exhibited in his affidavits any letters, bank pay-slips or other documents that indicated any monetary contribution by him towards the capital of the respondent — he replied in the negative. And, upon the further query as to where the respondent's operating capital or running expenses came from if its paid-up capital was a mere RM2, since the petitioner had disposed that the RM100,000 credited into the respondent's account by Charles was utilised for the latter's personal purposes, counsel replied that the respondent's operating expenses may have come from its day to day operating income. This is quite a remarkable and incredible answer — not to mention that the respondent would not have any startup capital. So, until now the petitioner has not been able to condescend upon any particulars or documents that would indicate the nature or extent of his monetary contribution to the capital or running expenses of the respondent. Indeed, even if his allegation that Charles and his wife, Chooi Lee, had often utilised the respondent's funds for their personal purposes is true — bereft of any record of prompt complaints from him as and when they occur — he had unwittingly conveyed to this court a scenario which confirms that Charles and his wife had acted in a manner consistent with the fact that they were the true beneficiaries of the respondent and that the petitioner was only a trustee for Charles. Thus, by applying normal evidential principles, this court finds as a matter of fact that the petitioner had indeed held, and is now holding his share in the respondent in trust for Charles.

On the question of whether a rebuttable presumption of resulting trust had arisen because money had been advanced by Charles on the formation and get-up capital of the respondent

[14] When money is advanced for or property transferred to or purchased for a person, either of two situations may arise: the presumption of advancement or the presumption of resulting trust, both of which are rebuttable. In *Neo Tai Kim v Foo Stie Wah* [1985] 1 MLJ 397, Lord Brightman, in delivering the judgment of the Privy Council stated the doctrine of presumption of advancement in the following words (at p 399):

> The nature of the presumption of advancement is accurately stated in *Snell's Principles of Equity* (27th Ed) p 176 et seq, under the distinguished editorship of Sir Robert Megarry VC. 'This presumption of advancement, as it is called applies to all cases in which the person providing the purchase-money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed. [eg] where the former is the husband or father of, or stands in *loco parentis* to, the latter … Accordingly, if a man buys property and has it conveyed to his wife … prima facie this is a gift to her … However, under modern

A conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened …'

[15] In my view the 'presumption of advancement' is could be stated as no more than a circumstance of evidence which raises the presumption of trust, arising out of an equitable obligation on the part of the giver to support, or make provision for, the recipient of property where there exists relationships as aforesaid. This presumption of advancement may only be rebutted by clear, distinct and admissible evidence. This has been aptly and admirably put by Lord Denning in *Palaniappa Chettiar v Arunasalam Chettier* [1962] MLJ 143, when he said (at E p 145):

> He had also to get over the presumption of advancement: for wherever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight, circumstances, see *Shephard v Cartwright* [1955] AC 431, at p 445. The fact that the father received the income does not suffice, see *Commissioner of Stamp Duties v Byrnes* [1911] AC 386.

[16] Due to the absence of any equitable obligation on the part of the provider of funds in the instant case before me, the doctrine of presumption of advancement does not arise. Nevertheless, I would have to consider the question of the doctrine of presumption of resulting trust.

[17] In *Re Vandervell's Trusts, White & Ors v Vandervell Trustees Ltd* [1974] 1 All ER 47 Megarry J (as he then was) in considering the question of resulting trusts said, at pp 68–69:

> It seems to me that the relevant points on resulting trusts may be put in a series of propositions … The propositions are the broadest of generalisations, and do not purport to cover the exception and qualification that doubtless exist. Nevertheless, these generalisations at least provide a starting point for the classification of a corner of equity which might benefit from some attempt at classification. The propositions are as follows:
>
> (1) ...;
>
> (2) ...;
>
> (3) Before any doctrine of resulting trust can come into play, there must at least be some effective transaction which transfers or creates some interest in property;
>
> (4) Where *A* effectually transfers to *B* (or creates in his favour) any interest in any property, whether legal or equitable, a resulting trust

for *A* may arise in two distinct classes of case. For simplicity, I shall confine my statement to cases in which the transfer or creation is made without *B* providing any valuable consideration, and where no presumption of advancement can arise; and I shall state the position for transfers without specific mention of the creation of new interests:

(a) The first class of case is where the transfer to *B* is not made on any trust. If, of course, it appears from the transfer that *B* is intended to hold on certain trusts, that will be decisive, and the case is not within this category; and similarly if it appears that *B* is intended to take beneficially. But in other cases there is a rebuttable presumption that *B* holds on a resulting trust for *A*. The question is not one of the automatic consequences of a dispositive failure by *A*, but one of presumption: the property has been carried to *B*, and from the absence of consideration and any presumption of advancement *B* is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for *A* absolutely. The presumption thus establishes both that *A* is to take on trust and also what that trust is. Such resulting trusts may be called 'presumed resulting trusts'.

(b) The second class of case is where the transfer to *B* is made on trusts which leave some or all of the beneficial interest undisposed of. Here *B* automatically holds on a resulting trust for *A* to the extent that the beneficial interest has not been carried to him or others. The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of *A*'s failure to dispose of what is vested in him. Since ex hypothesi the transfer is on trust, the resulting trust does not establish the trust but merely carries back to *A* the beneficial interest that has not been disposed of. Such resulting trusts may be called 'automatic resulting trusts'.

(5) Where trustees hold property in trust for *A*, and it is they who, at *A*'s direction, make the transfer to *B*, similar principles apply, even though on the face of the transaction the transferor appears to be the trustees and not *A*. If the transfer to *B* is on trust, *B* will hold any beneficial interest that has not been effectually disposed of on an automatic resulting trust for the true transferor, *A*. If the transfer to *B* is not on trust, there will be a rebuttable presumption that *B* holds on a resulting trust for *A*.

[18] In the case at hand, from the evidence adduced by the respondent, I find that the latter has successfully raised the presumption of resulting trust which imposes an onus on the petitioner to rebut this presumption through his affidavit evidence now before me. Now, let me study the petitioner's

affidavits to determine whether he has rebutted the onus that now sits on his shoulders. I have earlier found that he has not exhibited a single scrap of evidence to satisfy this court that he had made monetary contribution towards the operating capital or running costs of the respondent other than being a paid employee cum director of same. I am unable to accept the petitioner's contention that he is the rightful owner of his share in the respondent in the light of the facts disclosed in exhs YCL–1 to 8 of encl 44, the authenticity of which documents were not disputed with any cogency. Surely, as he was in a prominent position despite not having to incur any expenses, the petitioner must have been a mere trustee of the said share on behalf of Charles. Clearly, the respondent has sufficiently shown to my satisfaction that the petitioner has at all material times held the share in trust for Charles. I also find that the petitioner has failed to discharge the burden which had shifted to him. As Charles is the rightful owner of the share, the petitioner is not free to act as he wishes. He is subjected to Charles's directions. Hence, it is my ruling that the petitioner has no locus standi to commence this petition, and encl 1 ought to be dismissed with cost.

Whether, in any event, the law requires or enjoins this court to consider the principles of equity in a petition under s 218(1)(i) of the Act in view of the particular wording of the provision

[19] A further pertinent issue that this court would have to deal with is, whether, considering that the petitioner had framed his petition under s 218(1)(i) of the Act, which had incorporated the words 'just and equitable', this court is not precluded from going behind the register and/or invoking equitable principles in its determination on the petition itself, including his locus standi to file this petition.

[20] Section 218(1)(i) of the Companies Act 1965 reads as follows:

> The court may order the winding up if —
>
> (i) the court is of the opinion that *it is just and equitable* that the company be wound up …

[21] Our s 218(1)(i) is in pari materia with the provisions of s 222(f) of the English Companies Act 1948 (C 38) which states that: 'A company may be wound up by the court if — (f) the court is of the opinion that it is *just and equitable* that the company should be wound up.' The application of the 'just and equitable' provision in the section was discussed in the House of Lords case of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 ('*Ebrahimi*'). In that case, Lord Wilberforce

said ([1973] AC 360 at p 379, [1972] 2 All ER 492 at pp 499–500 and [1972] 2 WLR 1289 at pp 1297–1298): A

> My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words '*just and equitable*' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The '*just and equitable*' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> *It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.*
>
> (Emphasis added.)

B C D E F G H

[22] I have located another more recent English case, *O'Neill & Anor v Phillips & Ors* [1999] 1 WLR 1092 ('*O'Neill v Phillips*') where the House of Lords had to deal with s 459(1) (as amended by the Companies Act 1989, Schedule 19 para 11) of the recently enacted Companies Act 1989. This provision states: I

A member of a company may apply to the court by petition for an order under this Part *on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members* (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

[23] Though the term 'unfairly prejudicial' was used in that provision, yet the English courts have held that the provision (s 459(1)) has conferred upon the court a wide power to do what appeared 'just and equitable'. This was what Lord Hoffmann in *O'Neill v Phillips* had to say about the expression 'unfairly prejudicial':

> In *s 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief*. It is clear from the *legislative history* (which I discussed in *In re Saul D Harrison & Son Plc* [1995] 1 BCLC 14, 17-20) that it *chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable*. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in *In re JE Cade & Son Ltd* [1992] BCLC 213, 227: 'The court … has a very wide discretion, but it does not sit under a palm tree.'
>
> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of family. In some sports it may require, at best, observance of the rules, in other ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. *So the context and background are very important*.
>
> In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. *Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societies, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law*.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be heard to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that *there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company*

to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in s 459 runs parallel to that which Your Lordships' House, in In re Westbourne Galleries Ltd [1973] AC 360, *adopted in giving content to the concept of 'just and equitable' as a ground for winding up*. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said, at p 379:

The words 'just and equitable' are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act [1948] and by the articles for association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The *'just and equitable' provision* does not, as the respondents [the company] suggest, *entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way*.

I would apply the same reasoning to the concept of unfairness in s 459.

[24] Accepting and following the authority of the above decision in *O'Neill v Phillips* pertaining to s 459(1) (as amended) of the English Companies Act 1989, which bear strikingly similar wording to s 181(1)(a) of our Act, it is my view that our courts should also be guided — as the law Lords have said — by principles of equity when determining petitions under s 181(1) of the Act.

[25] Adopting the rationale and ratio established in *Ebrahimi and O'Neill v Phillips*, I hold that it is incumbent upon our courts, in their determination of any petition under s 218(1)(i) of the Act, to consider and be guided by the established principles of equity, whether or not any issue of shares being held in trust has been raised. Consequently, it is also my further decision in this case that, following the trite principles laid down by the aforesaid high authorities, which enjoins me to determine this petition under s 218(1)(i) through the prism of equitable principles, I find that, in the light of the particular circumstances deposed to in the respondent's affidavits, it would be wholly inequitable, unjust and contrary to good faith to allow the petitioner to rely upon and exercise his strict legal powers to insist that this court makes

a drastic winding up order against the respondent. In the event, encl 1 is now dismissed with costs.

RE ENCLOSURE 16

[26] As I had ruled in encl 1 that the petitioner has no locus standi to commence the present petition, the result would also be that the petitioner could not maintain any interlocutory application in the present petition. Hence, it is unnecessary for me to decide on the merits of encl 16. On this ground alone encl 16 could not stand and ought to be dismissed with costs. Be that as it may, I shall now proceed to deal with encl 16 on its merits. The application for an order pursuant to s 305 of the Act is commonly referred to as a misfeasance action. It is common ground that the application in encl 16 is made against Charles and Yap Chooi Lee and not the respondent. The undisputed fact is that on 15 June 2005, a consent order was recorded whereby the respondent was allowed to make payments out of the respondent's current account in Maybank Berhad, in the manner spelt out in the said consent order, pending disposal of encl 1. The petitioner later discovered that a sum of RM580,000 was transferred out of the respondent's account to a private account belonging to Charles in Hong Leong Bank Berhad by way of a telegraphic transfer. Also, apart from that sum, there have been other payments made from the respondent's account which were not in compliance with the consent order. It is common ground that the consent order was made on the morning of 15 June 2005, and that on the afternoon of the same day that the order was made, the sum of RM580,000 was transferred out of the respondent's account to the private account of Charles.

[27] It is also common ground that prior to the filing of encl 16, the petitioner has applied to cite Yap Chooi Lee and Charles for contempt (see encl 18) based on the same ground as in the present application. Enclosure 18 was dismissed with costs by the court. For this reason it is the contention of the respondent's counsel that the principle of res judicata applies against the petitioner. In *Government of Malaysia v Datuk Chong Kok Lim* [1973] 2 MLJ 74 the learned judge who had occasion to deal with this principle had observed (at p 75):

> The following classic passage from the judgment of Sir William de Grey found in *The Duchess of Kingston's Case* 1 Smith's Leading Cases (13 Ed) 644 is a statement of the leading principles on the plea of res judicata:
>
> > From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner,

> conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

[28] The principles of res judicata have been codified in s 6 of our (former) Civil Procedure Code which is the same as s 11 of the Indian Civil Procedure Code. It was at one time thought that as the words used in s 6 were 'has been directly and substantially in issue in a former suit' the principles of res judicata could not apply to proceedings in the same suit. However, in the case of *Ram Kirpal Shukul v Mussumat Rup Kuari* (1883) LR 11 Ind App 37; ILR 6 All 269 p 274, the Privy Council, had held that, upon general principles of law, an interlocutory judgment in a suit was binding upon the parties in every proceeding in that suit. This was what Their Lordships had said:

> The matter decided by Mr Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them, as an interlocutory judgment in a suit is binding, upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon s 13, Act X of 1877 (s 6 of our former Civil Procedure Code) but upon general principles of law. *If it were not binding there would be no end to litigation* ... the parties were bound by the decision of Mr Probyn, who, whether right or wrong, had decided that it did (ie that the decree awarded future means profits) ... a decision which, not having been appealed, was final and binding upon the parties and those claiming under them.

[29] This court has to note that the allegation, that immediately after the consent order, Yap Chooi Lee and Charles had wrongfully utilised the funds of the respondent (the very basis of this encl 16 application), had been raised by the petitioner and dealt with in encl 18 earlier. And, that the petitioner had failed in his attempt vide encl 18 to cite both Yap Chooi Lee and Charles for contempt based on the same allegation. The issue of malfeasance and breach of duty of such persons have been fully ventilated before the court. Thus, I hold that the petitioner could not re-litigate the same issue, and even upon its merits, encl 16 ought to be and is now dismissed with costs.

Petition dismissed with costs.

Reported by Brendan Navin Siva